Murugan a/l Supparamaniam v Timbalan Menteri Dalam Negeri, Malaysia & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–126 OF 2009(B)
ZAKI AZMI CHIEF JUSTICE, GOPAL SRI RAM AND MOHD GHAZALI FCJJ
21 JANUARY 2010

Administrative Law — Remedies — Habeas corpus — Application for — Burden on respondent to proof compliance of first limb of s 6(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Whether respondent discharged burden — Whether appellant's detention lawful

The appellant was detained pursuant to an order under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). The appellant subsequently made representations which were considered and dealt with by the advisory board pursuant to art 151 of the Federal Constitution read with s 6(1) of the Ordinance. The complaint was that s 6(2) of the Ordinance was not complied with which rendered the appellant's detention unlawful.

Held, allowing the application:

(1) Section 6(2) in its imperative first limb provides an important procedural safeguard to detenus, as it provides for a procedural mechanism to further protect a detenu's rights. The burden of satisfying the court that a detention is in accordance with law lies on the detaining authority (see paras 3–4).

(2) In the present instance, the respondents in purported proof of the compliance of the first limb of s 6(1) offered two diametrically conflicting explanations. The first respondent in para 14 of his affidavit said that His Majesty did in fact consider the board's recommendations. However, this was contradicted by the board's secretary who said that as at the date of her affidavit there had been no response from His Majesty, the irresistible inference being that His Majesty was yet to consider the board's recommendations. In the face of the obvious conflict the respondents particularly the first respondent must be held not to have discharged the onus upon him (see para 5).

Observation

Over a considerable period of time the court had had to issue habeas corpus solely on the ground that the affidavit evidence filed on behalf of the

detaining authority was seriously defective or in material conflict with other affidavits filed in opposition to the detenu's application. The fault lies with those responsible for settling the affidavits in not ensuring that the facts have been properly ascertained. It is a matter of pure amazement that federal counsel in the Home Ministry are unconcerned with the contents of the evidence settled by them. If they find that there is indeed a conflict between witnesses whose written evidence they will seek to rely upon in support of the detention order, it was their plain duty to advise accordingly. It was certainly not their function to file conflicting evidence and then seek justification for the detention order. The sooner this type of indifference was addressed the sooner such cases as the present would end.

[Bahasa Malaysia summary

Perayu telah ditahan berikutan perintah di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan'). Perayu kemudiannya membuat representasi yang telah dipertimbangkan dan diuruskan oleh lembaga penasihat berikutan perkara 151 Perlembagaan Persekutuan dibaca bersama s 6(1) Ordinan. Aduan adalah berkenaan s 6(2) Ordinan tidak dipatuhi yang mana menjadikan penahanan perayu salah di sisi undang-undang.

Diputuskan, membenarkan permohonan:

(1) Seksyen 6(2) di dalam bahagian pertama imperatif memperuntukkan prosedur penting melindungi orang tahanan, kerana ia memperuntukkan mekanisma prosedur untuk melindungi hak-hak orang tahanan seterusnya. Beban untuk memuaskan mahkamah bahawa penahanan selaras dengan undang-undang terletak pada pihak berkuasa yang menahan (lihat perenggan 3–4).

(2) Dalam kes ini, responden-responden dalam tujuan membuktikan kepatuhan pada bahagian pertama s 6(1) mengemukakan dua penjelasan yang sama sekali bercanggah. Responden pertama dalam perenggan 14 afidavitnya mengatakan bahawa Yang di-Pertuan Agong sebenarnya telah mempertimbangkan cadangan-cadangan lembaga. Walau bagaimanapun ini dinafikan oleh setiausaha lembaga tersebut yang mengatakan bahawa pada tarikh afidavitnya, tiada balasan daripada Yang di-Pertuan Agong, menunjukkan inferens bahawa Yang di-Pertuan Agong belum mempertimbangkan cadangan-cadangan lembaga. Disebabkan oleh konflik yang jelas, responden-responden, khususnya responden pertama, mestilah diputuskan tidak berjaya melepaskan beban pembuktian yang dikenakan ke atasnya (lihat perenggan 5).

Pemerhatian

Dalam satu jangkamasa munasabah, mahkamah harus mengeluarkan habeas corpus semata-mata atas alasan bahawa keterangan afidavit yang difailkan bagi pihak berkuasa yang menahan adalah satu kecacatan serius atau mempunyai konflik yang material dengan afidavit-afidavit lain yang difailkan menentang permohonan detenu. Kesalahan ini terletak pada mereka yang bertanggungjawab menyelesaikan afidavit-afidavit kerana tidak memastikan bahawa fakta-fakta telah dipastikan betul. Adalah satu perkara yang memeranjatkan bahawa peguam persekutuan di Kementerian Dalam Negeri tidak mengambil berat isi kandungan keterangan yang disediakan oleh mereka. Jika mereka mendapati bahawa memang benar terdapat konflik antara saksi-saksi yang mana bukti bertulis mereka akan digunakan bagi menyokong perintah tahanan, adalah menjadi tugas mereka untuk memberi nasihat sewajarnya. Bukan tugas mereka untuk memfailkan keterangan yang bercanggah dan kemudian meminta justifikasi bagi perintah tahanan. Lebih cepat perbezaan ini diberikan perhatian, lebih cepat kes ini akan selesai.]

Notes

For cases on habeas corpus, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 580–634.

Cases referred to

SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 6 CLJ 705, FC (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 4(1), 6, 6(1), (2)
Federal Constitution art 151

Appeal from: Criminal Application No MT5–44–48 of 2009 (High Court, Shah Alam)

Baljit Singh (Abd Shukor Ahmad with him) (Shukor Baljit Singh & Partners) for the appellant.
Najib bin Zakaria (Legal Advisor Office, Ministry of Home Affairs, Malaysia) for the respondents.

Gopal Sri Ram FCJ (delivering judgment of the court):

[1] We heard and allowed this appeal on 21 January 2010, directing the issue forthwith of habeas corpus. The reasons for our decision are now produced.

[2] The appellant detenu was detained pursuant to an order of the Deputy Minister of Home Affairs made under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). The order is dated 30 April 2009. The appellant then made representations which were considered and dealt with by the advisory board pursuant to art 151 of the Federal Constitution read with s 6(1) of the Ordinance. The complaint here is that s 6(2) of the Ordinance was not complied with thereby rendering the appellant's detention unlawful. To properly appreciate the nature of the complaint is best that we reproduce s 6 in full. This is what it says:

> (1) Whenever any person has made any representations under section 5(1) to an Advisory Board, the Advisory Board, shall within three months from the date on which such representations were received by the Advisory Board, or such longer period as the Yang di-Pertuan Agong may allow, consider such representations and make recommendations thereon to the Yang di-Pertuan Agong.
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> (2) Upon considering the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to the provisions of section 7, be final, and shall not be called into question in any Court.

[3] Section 6(2) is constructed in a bifurcated fashion. The first limb which states 'Upon considering the recommendations of the Advisory Board' is imperative in terms. It imposes a duty on His Majesty, as a Constitutional Monarch, to address his mind to the recommendations of the Advisory Board. The second limb is permissive. It confers a discretion on His Majesty to give the Minister such directions as His Majesty shall think fit. And the exercise by His Majesty of the discretion vested in him by the second limb is put beyond judicial review. In our judgment the subsection in its imperative first limb provides an important procedural safeguard to detenus. For it provides for a procedural mechanism to further protect a detenu's rights.

[4] The burden of proving that the recommendations of the advisory board were in fact considered by His Majesty lies on the respondents. This flows from the settled principle that the burden of satisfying the court that a detention is in accordance with law lies on the detaining authority. Hence, in a preventive detention case where written law demands something to be done, the burden of proving that it was done lies on the detaining authority. Now, whether the recommendations were indeed considered by the Yang di-Pertuan Agong is an issue of fact that must be proved like any other fact by the person within whose sole and exclusive knowledge that fact resides.

[5] In the present instance the respondents in purported proof of the compliance of the first limb of s 6(1) offered two diametrically conflicting explanations. The first respondent in para 14 of his affidavit dated 9 June 2009 says that His Majesty did in fact consider the board's recommendations. However, this is contradicted by the board's secretary who says that as at the date of her affidavit (dated 12 August 2009) there has been no response from His Majesty, the irresistible inference being that His Majesty is yet to consider the board's recommendations. The principles governing the evaluation of affidavit evidence in a case of this sort have been set out by this court in *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705 and we do not wish to repeat what was there said. Suffice to say that in the face of this obvious conflict the respondents and in particular the first respondent must be held not to have discharged the onus upon him. We were therefore left with no alternative but to order the appellant's immediate release.

[6] Before concluding there is an observation we would make. Over a considerable period of time this court has had to issue habeas corpus solely on the ground that the affidavit evidence filed on behalf of the detaining authority is seriously defective or in material conflict with other affidavits filed in opposition to the detenu's application. The fault lies with those responsible for settling the affidavits in not ensuring that the facts have been properly ascertained. It is a matter of pure amazement that federal counsel in the Home Ministry are unconcerned with the contents of the evidence settled by them. If they find that there is indeed a conflict between witnesses whose written evidence they will seek to rely upon in support of the detention order it is their plain duty to advise accordingly. It is certainly not their function to file conflicting evidence and then to seek justification for the detention order. The sooner this type of indifference is addressed the sooner such cases as the present will end.

Application allowed.

Reported by M Sivabarathi